

This rule was adopted on an emergency basis effective January 26, 2006. It may be used to determine tax liability until May 26, 2006, unless the Department adopts a permanent rule prior to this date.

WAC 458-20-185 Tax on tobacco products. (1) Introduction.

This rule explains the tax liabilities of persons engaged in business as ~~a~~ retailers~~,~~ and/or distributors ~~or-subjobber~~ of tobacco products. The tax on tobacco products is in addition to all other taxes owed. For example, retailers~~,~~ and distributors~~,~~ ~~and-subjobbers~~ are liable for business and occupation tax on their retailing or wholesaling activities, use tax on tobacco products distributed as samples, and litter tax on the value of the tobacco products. See WAC 458-20-186 for tax liabilities associated with taxes which apply exclusively to cigarettes.

(2) **Definitions.** The following definitions apply to this rule unless the context clearly requires otherwise.

(a) "Tobacco products" means all tobacco products except cigarettes as defined in RCW 82.24.010. The term includes:

- (i) Cigars, cheroots, stogies, and periques;
- (ii) Granulated, plug cut, crimp cut, ready rubbed, and other smoking tobacco;
- (iii) Snuff, snuff flour, cavendish, plug and twist tobacco, fine-cut, and other chewing tobaccos; and
- (iv) Shorts, refuse scraps, clippings, cuttings and sweepings of tobacco, and other kinds and forms of tobacco, prepared in such manner as to be suitable for chewing or smoking in a pipe or otherwise, or both for chewing and smoking.

(b) "Manufacturer" means a person who manufactures and sells tobacco products.

(c) "Distributor" means:

(i) Any person engaged in the business of selling tobacco products in this state who brings, or causes to be brought, into this state from ~~without~~ outside the state any tobacco products for sale;

(ii) Any person who makes, manufactures, ~~or~~-fabricates, or stores tobacco products in this state for sale in this state;

(iii) Any person engaged in the business of selling tobacco products ~~without~~ outside this state who ships or transports tobacco products to retailers in this state, to be sold by those retailers; or

(iv) Any person engaged in the business of selling tobacco products in this state who handles for sale any tobacco products that are within this state but upon which tax has not been imposed.

~~(d) "Subjobber" means any person, other than a tobacco manufacturer or distributor, who buys tobacco products from a distributor and sells them to persons other than the ultimate consumers.~~

(ed) "Retailer" means any person engaged in the business of selling tobacco products to ultimate consumers.

(fe) "Sale" means (i~~any~~) any transfer, exchange, or barter, in any manner or by any means whatsoever, for a consideration, and includes and means all sales made by any person. ~~It~~(ii) The term "sale" includes ~~alla gifts~~ by a persons engaged in the business of selling tobacco products, for advertising, promoting, or as a means of evading the provisions of chapter 82.26 RCW., ~~or for any other purposes whatsoever.~~

~~(g) "Wholesale sales price" means the established price for which a manufacturer sells tobacco product to the distributor, exclusive of any discount or other reduction.~~

~~(i) A wholesale sales price that is an established price must reflect the fair market value of the tobacco products. In the case where a seller and buyer establish a sales price that does not reflect fair market value, such as may occur in certain sales between affiliated companies, the wholesale sales price is the fair market value of the tobacco product and not the sales price established by the seller and buyer.~~

~~(ii) The phrase "discount or other reduction" includes any reduction from the established wholesale sales price made to a specific customer or class of customers.~~

~~**Example.** Pursuant to a half price promotion, a manufacturer sells tobacco products to a distributor. The invoice lists \$100 as the price of the product less a \$50 discount resulting in a net invoice of \$50. The tax is due on \$100 which is the wholesale sales price exclusive of any discount or other reduction.~~

(hf) "Business" means any trade, occupation, activity, or enterprise engaged in for the purpose of selling or distributing tobacco products in this state.

(ig) "Place of business" means any place where tobacco products are sold or where tobacco products are manufactured, stored, or kept for the purpose of sale ~~or consumption~~, including any vessel, vehicle, airplane, train, or vending

machine.

(~~j~~h) "Retail outlet" means each place of business from which tobacco products are sold to consumers.

(~~k~~i) "Department" means the department of revenue.

(~~l~~j) "Person" means any individual, receiver, administrator, executor, assignee, trustee in bankruptcy, trust, estate, firm, copartnership, joint venture, club, company, joint stock company, business trust, municipal corporation, the state and its departments and institutions, political subdivision of the state of Washington, corporation, limited liability company, association, society, ~~or~~ any group of individuals acting as a unit, whether mutual, cooperative, fraternal, nonprofit, or otherwise. The term excludes any person immune from state taxation, including the United States or its instrumentalities, and federally recognized Indian tribes and enrolled tribal members, conducting business within Indian country.

(~~m~~k) "Indian country" means the same as defined in ~~WAC 458-20-192~~ chapter 82.24 RCW.

(l) "Actual price" means the total amount of consideration for which tobacco products are sold, valued in money, whether received in money or otherwise, including any charges by the seller necessary to complete the sale such as charges for delivery, freight, transportation, or handling.

(m) "Affiliated" means related in any way by virtue of any form or amount of common ownership, control, operation, or management.

(n) "Board" means the liquor control board.

(o) "Cigar" means a roll for smoking that is of any size or shape and that is made wholly or in part of tobacco, irrespective of whether the tobacco is pure or flavored, adulterated or mixed with any other ingredient, if the roll has a wrapper made wholly or in greater part of tobacco. "Cigar" does not include a cigarette.

(p) "Cigarette" has the same meaning as in RCW 82.24.010.

(q) "Manufacturer's representative" means a person hired by a manufacturer to sell or distribute the manufacturer's tobacco products, and includes employees and independent contractors.

(r) "Taxable sales price" means:

(i) In the case of a taxpayer that is not affiliated with the manufacturer, distributor, or other person from whom the taxpayer purchased tobacco products, the actual price for which the taxpayer purchased the tobacco products;

(ii) In the case of a taxpayer that purchases tobacco

products from an affiliated manufacturer, affiliated distributor, or other affiliated person, and that sells those tobacco products to unaffiliated distributors, unaffiliated retailers, or ultimate consumers, the actual price for which that taxpayer sells those tobacco products to unaffiliated distributors, unaffiliated retailers, or ultimate consumers;

(iii) In the case of a taxpayer that sells tobacco products only to affiliated distributors or affiliated retailers, the price, determined as nearly as possible according to the actual price, that other distributors sell similar tobacco products of like quality and character to unaffiliated distributors, unaffiliated retailers, or ultimate consumers;

(iv) In the case of a taxpayer that is a manufacturer selling tobacco products directly to ultimate consumers, the actual price for which the taxpayer sells those tobacco products to ultimate consumers;

(v) In the case of a taxpayer that has acquired tobacco products under a sale as defined in subsection (2)(e)(ii) of this rule, the price, determined as nearly as possible according to the actual price, that the taxpayer or other distributors sell the same tobacco products or similar tobacco products of like quality and character to unaffiliated distributors, unaffiliated retailers, or ultimate consumers; or

(vi) In any case where (i) through (v) of this subsection do not apply, the price, determined as nearly as possible according to the actual price, that the taxpayer or other distributors sell the same tobacco products or similar tobacco products of like quality and character to unaffiliated distributors, unaffiliated retailers, or ultimate consumers.

For purposes of (i) and (ii) of this subsection only, "person" includes both persons as defined in subsection (2)(j) of this rule and any person immune from state taxation, including the United States or its instrumentalities, and federally recognized Indian tribes and enrolled tribal members, conducting business within Indian country.

(s) "Taxpayer" means a person liable for the tax imposed by chapter 82.26 RCW.

(t) "Unaffiliated distributor" means a distributor that is not affiliated with the manufacturer, distributor, or other person from whom the distributor has purchased tobacco products.

(u) "Unaffiliated retailer" means a retailer that is not affiliated with the manufacturer, distributor, or other person from whom the retailer has purchased tobacco products.

(3) Distributor and retail tobacco products vendor licensing requirements and responsibilities.

(a) License required. No person, other than a government instrumentality or an Indian retailer as set forth in subsection of this rule, may engage in the retail or wholesale distribution of tobacco products in this state without a license.

(b) Distributor's license. Prior to selling or distributing tobacco products from a stock of goods in Washington or selling to retailers in Washington, each distributor must first obtain a tobacco distributor's license from the department of licensing.

(i) Background check. Each distributor must undergo a criminal background check before a license will be issued. Chapter 82.26 RCW. The background check must be completed to the satisfaction of the liquor control board and the department of revenue. Failure to provide information sufficient to complete the background check may result in denial of the license. A background check will not be required if the applicant has had a background check under chapter 66.24 or 82.24 RCW.

(ii) Application. Application for license or renewal of license is made on forms supplied by the department of licensing and must be accompanied by the annual license fee as provided in chapter 82.26 RCW. A distributor license is valid for one year from the date it is issued. The annual fees will not apply if the licensee pays the corresponding annual cigarette distributor fees under RCW 82.24.510.

(iii) Multiple locations. If the distributor sells, or intends to sell, tobacco products at more than one place of business, whether temporary or permanent, a separate license with a license fee as provided in chapter 82.26 RCW is required for each additional place of business. Each license must be exhibited in the place of business for which it is issued.

(c) Duties and responsibilities of licensed distributors.

(i) Sales restricted. Distributors selling tobacco products in this state may sell those products only to Washington retailers or distributors who have a current tobacco products license, to other licensed distributors, or to Indian tribal entities authorized to possess tobacco products that are not taxed by the state.

(ii) Manufacturers' representatives. Manufacturers selling tobacco products through manufacturer's representatives must provide the department a current list of the names, addresses,

and telephone numbers of all such representatives. Mail the list to Washington State Department of Revenue, PO Box 47477, Olympia, WA 98504. The manufacturer must have a distributor's license and its representatives must carry a copy of the license at all times when selling or distributing tobacco products in this state.

(d) Retail license. Prior to the retail sale or distribution of tobacco products, each retailer must first be issued a retail tobacco license from the department of licensing. A license is required for each location at which tobacco products are sold at retail. Each license must be exhibited at the place of business for which it is issued.

Applications for a license or the renewal of a license are made on forms supplied by the department of licensing and must be accompanied by the annual license fee as provided in chapter 82.26 RCW. A retail tobacco license is valid for one year from the date it is issued. The annual tobacco license fees will not apply if the licensee pays the corresponding annual cigarette retailer license fees as provided in RCW 82.24.510.

(e) Duties and responsibilities of retailers. A retailer that obtains tobacco products from an unlicensed distributor or any other person that is not licensed under chapter 82.26 RCW must be licensed both as a retailer and a distributor. The retailer is liable for the tax imposed under RCW 82.26.020 with respect to the tobacco products acquired from the unlicensed person that are held for sell, handling, or distribution in this state. For example, if a retailer buys tobacco products from an Indian smoke shop or an out of state distributor that does not have a tobacco distributor license, the retailer must obtain a distributor license and pay the tobacco tax due.

(34) Rate and measure of tax. The Washington state tobacco products tax is an excise tax levied on the ~~wholesale~~ taxable sales price (as defined in RCW 82.26.010 and this rule) on all tobacco products sold, used, consumed, handled, or distributed within the state.

~~—The rate of tax is a combination of statutory percentage rates found in RCW 82.26.020., 82.26.025, and 82.26.028. The total current rate of tax is shown on the current combined excise tax return.~~

(45) Imposition of tax. The tax is imposed once on all tobacco products sold, used, consumed, handled, or distributed within this state.

(a) When tax is imposed. The tax is imposed at the time

the distributor:

(i) Brings, or causes to be brought, into this state from ~~without~~ outside the state tobacco products for sale; or

(ii) Makes, manufactures, or fabricates tobacco products in this state for sale in this state; or

(iii) Ships or transports tobacco products to retailers in this state, to be sold by those retailers; or

(iv) Handles for sale any tobacco products that are within this state but upon which tax has not been imposed. For example, a retailer with a place of business in this state purchases for sale tobacco products from an enrolled tribal member of a federally recognized tribe located within Indian country. Because the tax was not imposed on the enrolled tribal member, the retailer must also be licensed as a distributor ~~pay~~ and pay the tax.

~~(b) Additional occasion when tax may be imposed. Any retailer who fails to keep invoices as required under chapter 82.32 RCW and which invoices do not conform to the requirements set forth in subsection (5)(b) of this rule is liable for the tax on any uninvoiced tobacco product which that retailer handles for sale.~~

~~(c) When an out-of-state person is a distributor who must pay the tax. A person located out of state who is selling tobacco products to Washington wholesalers from a stock of goods located outside this state is not a distributor and therefore is not liable for the tax.~~

~~(i) On the other hand, a person located out of state who is selling and shipping tobacco products to Washington retailers from an out-of-state stock of goods is a distributor and is subject to the tax. If the out-of-state person is not required to register and pay taxes in Washington, the retailers to whom it sells must pay the tax. However, such out of state persons may elect to register with the state and pay the tax.~~

~~(ii) A Washington retailer who purchases tobacco from an out of state stock of goods from a person located out of state who is not required to register and pay taxes in Washington may provide to that person a certificate affirming that the Washington retailer will remit to the state the tax due. Both the out of state person and the Washington retailer should retain a copy of such certificate. The certificate should substantially conform to the example shown below:~~

Retailer's Certificate of Remittance of Tax

~~The undersigned retailer hereby certifies that the undersigned will remit to the state the tax due on the tobacco products specified below purchased from seller. This certificate shall be considered a part of each order which the undersigned may give to the seller, unless otherwise specified, and shall be valid until revoked by the undersigned in writing or until it expires, whichever occurs first. This certificate expires four years from the effective date.~~

~~Name of Seller:—~~

~~Name of Retailer— Effective Date—~~

~~UBI/Registration #—~~

~~Address of Retailer—~~

~~Tobacco products purchased—~~

~~Agent for Retailer (print)—~~

~~Signature—~~

~~(iii)~~ **6) Tax on samples and sales to dual purchasers.** (i) A person who is located out-of-state and who is required to register and pay taxes in Washington may sell and ~~ship tobacco products to a Washington customer who is both a wholesaler distributor and retailer.~~ Under this circumstance, the ~~person~~ seller, the ~~customer~~ buyer, and the department may enter into a written agreement that identifies the person who will remit to the state the tax due as to those particular sales. The written agreement will contain such other terms and conditions that are acceptable to the department.

~~(iv)~~ **7) When a person located outside Washington distributes samples in this state, that person must pay the tax on those samples.**

~~(5) Books and records. Since the tobacco products tax is paid on returns as computed by the taxpayer rather than by affixing of stamps or decals, the law contains stringent provisions requiring that accurate and complete records be maintained. The records must include all pertinent papers and documents relating to the purchase, sale, or disposition of tobacco products and must be kept for a period of at least five years after the date of the document or the date of the entry appearing in the records.~~

(7) Record keeping and enforcement.

(a) **Books and records.** An accurate set of records showing all transactions related to the purchase, sale, or distribution of tobacco products must be retained for a period of at least five years. RCW 82.26.060, 82.26.070, and 82.26.080.

(ab) **Distributors.** Distributors must keep at each registered place of business complete and accurate records for that place of business. The records to be kept by distributors include itemized invoices of tobacco products held, purchased, manufactured, brought in or caused to be brought in from ~~without~~ outside the state or shipped or transported to retailers in this state, and of all sales of tobacco ~~products~~ products ~~except~~ ~~retail sales~~. The itemized invoice for each purchase or sale must be legible and must show the seller's name and address, the purchaser's name and address, the date of sale, and all prices and discounts. Itemized invoices must be preserved for five years from the date of sale.

(bc) ~~Retailers~~ **Retailers and subjobbers.** Retailers ~~and subjobbers~~ must secure itemized invoices of all tobacco products purchased. The itemized invoice for each purchase must be legible and must show the seller's name and address, the purchaser's name and address, the date of sale, and all prices and discounts. Itemized invoices must be preserved for five years from the date of sale.

~~(c) Warehouses. Records of all deliveries or shipments (including ownership, quantities) of tobacco products from any public warehouse of first destination in this state must be kept by the warehouse.~~

~~(6) Nonpayment of tax by retailers. If the department finds that any nonpayment of tax by the retailer was willful, penalties and interest shall be assessed in accordance with chapter 82.32 RCW. In the case of a second or plural nonpayment of tax by the retailer, penalties and interest will be assessed in accordance with chapter 82.32 RCW without regard to willfulness.~~

~~(a) Example. In the course of an audit of Retailer, the department determines that on several occasions Retailer failed to pay the tax. The department does not find the nonpayment to be willful. Retailer owes the tax due on all occasions of nonpayment and the penalties and interest is assessed on all but the first occasion of nonpayment. A few years later Retailer is audited again. The department finds one occasion of nonpayment of tax. In addition to the tax due, penalties and interest will be assessed in accordance with chapter 82.32 RCW.~~

~~(b) Example. In the course of an audit of Retailer #2, the department determines that on several occasions Retailer #2 failed to pay the tax. The department determines that the nonpayment of tax was willful. In addition to the tax due on all occasions of nonpayment, Retailer #2 owes penalties and interest on all occasions.~~

~~(7d) Reports and returns. The tax is reported on the combined excise tax return to be filed according to the reporting frequency assigned by the department. Detailed instructions for preparation of these returns may be secured from the department.~~

~~Out of state wholesalers or distributors selling directly to retailers in Washington should apply for a certificate of registration, and the department will furnish returns for reporting the tax.~~

~~Retailers, distributors, and subjobbers may be required to file a report with the department in compliance with the provisions of the National Uniform Tobacco Settlement when purchasing tobacco products from certain manufacturers. Please see WAC 458-20-264 and chapter 70.157 RCW.~~

(i) The department may require any person dealing in tobacco products in this state to complete and return forms, as furnished by the department, setting forth sales, inventory, and other data required by the department to maintain control over trade in tobacco.

(ii) **Tax Returns.** Every distributor shall report the tax on an excise tax return as provided in RCW 82.32.045.

(e) **Criminal provisions.** Chapter 82.26 RCW prohibits certain activities with respect to tobacco products. Persons handling tobacco within this state must refer to these statutes.

(f) **Search, seizure, and forfeiture.** Any tobacco products in the possession of a person selling tobacco in this state without a license or transporting tobacco products without the proper invoices or delivery tickets may be seized without a warrant by any agent of the department, agent of the board, or law enforcement officer of this state. In addition, all conveyances, including aircraft, vehicles, or vessels, used to transport the illegal tobacco product may be seized and forfeited.

(g) **Enforcement.** Pursuant to RCW 82.26.121 and 66.44.010, enforcement officers of the liquor control board may enforce all provisions of the law with respect to the tax on tobacco products. Retailers and distributors must allow department personnel and enforcement officers of the liquor control board

free access to their premises to inspect the tobacco products contained in the premises and to examine the books and records of the business. Failure to allow free access or to hinder or interfere with department personnel and/or enforcement officers of the liquor control board may result in revocation of the tobacco products license.

(h) **Suspension or revocation of distributor or retail tobacco licenses.** (i) The department has full power and authority to revoke or suspend the license of any wholesale or retail tobacco dealer in the state upon sufficient showing that the license holder has violated the provisions of chapter 82.26 RCW or this rule. If a person has both a tobacco license and a cigarette license, revocation of the tobacco license will also result in revocation of the cigarette license.

(ii) Any person whose license has been revoked must wait one year following the date of revocation before requesting a hearing for reinstatement. Reinstatement hearings are held pursuant to WAC 458-20-10001.

(i) **Penalties.** Penalties and interest may be assessed in accordance with chapter 82.32 RCW for nonpayment of tobacco tax.

(8) **Transporting tobacco products in Washington.**

(a) **Transportation of tobacco products restricted.** No person other than a licensed distributor, an authorized manufacturer's representative, or a licensed retailer may transport tobacco products for sale in this state, except as specifically set forth in chapter 82.26 RCW. Licensed distributors and retailers transporting tobacco products in this state must do so only in their own vehicles unless they have given prior notice to the liquor control board of their intent to transport tobacco products in a vehicle belonging to another person.

(b) **Notice required.** Persons other than licensed distributors, licensed retailers, or authorized manufacturer's representatives intending to transport tobacco products in this state must first give notice to the liquor control board of their intent to do so.

(c) **Invoices required.** All persons transporting tobacco products for sale in this state must have in their actual possession invoices or delivery tickets for the tobacco products that show the true name and address of the consignor or seller, the true name and address of the consignee or buyer, and the quantity and brands of the tobacco products being transported. Persons having tobacco products transported in this state on

Signature

(910) **Returned or destroyed goods.** A credit may also be taken for tobacco products destroyed or returned to the manufacturer on which tax was previously paid. If the credit is claimed against tax owed by the taxpayer or as a refund of tax paid, taxpayers must retain in their records appropriate documentation, affidavits or certificates conforming to those illustrated below:

(a) **Certificate of taxpayer.**

Claim for Credit on Tobacco Products
Tax Merchandise Destroyed

The undersigned certifies under penalty of perjury under the laws of the state of Washington that the following is true and correct to the best of his/her knowledge:

That he/she is (Title) of the (Business Name), a dealer in tobacco products; that the dealer has destroyed merchandise unfit for sale, said tobacco products having a wholesale sales price of \$; that tobacco tax had been paid on such tobacco products; that the tobacco products were destroyed in the following manner and in the presence of an authorized agent of the department of revenue:

.....
(State date and manner of destruction)

Attested to:
Date

By
Signature of Taxpayer or
Authorized Representative.
.....
Position with Dealer
.....
Dealer
.....
Address of Dealer

APPROVED:

.....
Authorized Agent of
Department of Revenue of the
State of Washington.

(b) **Certificate of manufacturer.**

Claim for Credit on Tobacco Products
Tax Merchandise Returned:

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The undersigned certifies under penalty of perjury under the laws of the state of Washington that the following is true and correct to the best of his/her knowledge:

That he/she is (Title) of the (Business Name), a manufacturer of tobacco products; that the manufacturer has received from (Dealer), (Address), a dealer in tobacco products within the State of Washington, certain tobacco products which were unfit for sale, the tobacco products having a wholesale sales price of \$; that the tobacco products were destroyed in the following manner:

.....
(Indicate date and manner of destruction)

Credit issued on Memo No.
credit approved by: Signature of Taxpayer or
 Authorized Representative

.....
on behalf of the Department Name of Manufacturer
of Revenue - State of
Washington

.....
Address

~~(10) Enforcement. Pursuant to RCW 82.26.121 and 66.44.010, enforcement officers of the liquor control board may enforce all provisions of the law with respect to the tax on tobacco products. Retailers, distributors, and subjobbers must allow department personnel and enforcement officers of the liquor control board free access to their premises to inspect the tobacco products contained in the premises and to examine the books and records of the business. Failure to allow free access or to hinder or interfere with department personnel and/or enforcement officers of the liquor control board may result in the revocation of the business license.~~

[Statutory Authority: RCW 82.32.300 and 82.01.060(2). 03-12-058, § 458-20-185, filed 6/2/03, effective 7/3/03. Statutory Authority: RCW 82.32.300. 94-10-061, § 458-20-185, filed 5/3/94, effective 6/3/94; 90-04-038, § 458-20-185, filed 1/31/90, effective 3/3/90; 83-07-032 (Order ET 83-15), § 458-20-185, filed 3/15/83; Order ET 71-1, § 458-20-185, filed 7/22/71; Order ET 70-3, § 458-20-185 (Rule 185), filed 5/29/70, effective 7/1/70.]